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Superintendent of Lands and Surveys, Kuching Division & Ors v Kuching Waterfront Development Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-01(W)-386–12 OF 2015
HAMID SULTAN, UMI KALTHUM AND ABDUL RAHMAN SEBLI JJCA
23 JANUARY 2018

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Land Law — Forfeiture — Validity of — State Authority took back possession of plaintiff's land for failing to comply with provision in Land Code requiring plaintiff to resume construction of abandoned building project — Land was subsequently sold to third party — High Court declared State Authority's re-entry upon plaintiff's land was unlawful, invalid and null and void and awarded plaintiff damages for loss of land and also exemplary damages — Court refused to grant all other declarations and orders sought by plaintiff — Whether the mere declaration that the re-entry was unlawful, invalid and null and void was insufficient in law to sustain the award of damages — Whether plaintiff's action was actually a suit against State Government for recovery of the land or to the possession thereof — Whether to entitle plaintiff to obtain damages, High Court should have granted declaration pursuant to proviso (b) of s 29(1) of Government Proceedings Act 1956 that plaintiff was entitled as against the State Government to the land or to the possession thereof and should also have set aside the re-entry/forfeiture order

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After becoming the registered owner of a piece of land in 1988, the respondent obtained local council approval to build a hotel on the land. For some reason, the construction was abandoned and the partially-constructed site became water-logged, an eyesore and a nuisance. In 1995, after the land was declared as falling within a Special Development Area (ie, Kuching's 'Golden Triangle'), the Superintendent of Lands and Surveys, Kuching Division ('the Superintendent') pursuant to the then newly-enacted s 33A of the Sarawak Land Code ('the SLC') notified the respondent that he would re-take possession of the land if construction work on the hotel was not resumed within a given timeframe. Due to the respondent's continued failure to resume construction works, the Superintendent took over possession of the land ('the re-entry') after which it was sold by public tender to the Sarawak Economic Development Corporation ('SEDC'). The respondent filed an action in the High Court for, inter alia, a determination that s 33A, which only came into effect in 1994, could not be applied retrospectively to forfeit the land and deny the respondent of its substantive rights that had accrued before s 33A or the Buildings Ordinance 1994 had come into being. The court agreed with the

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respondent and declared the re-entry as 'unlawful, invalid and null and void'. The court ordered the defendants in the suit to pay the respondent RM11,340,640 being the value of the land on the date of the re-entry, RM600,000 for improvements that had been done to the land and RM2.3m by way of exemplary damages together with interest and costs. The court did not grant a host of other prayers that the respondent had asked for, including: (a) a declaration that the re-entry was an invasion of the respondent's proprietary rights as the registered owner of the land; (b) an order setting aside the re-entry; (c) a declaration that the respondent was the legal and beneficial owner of the land and was entitled as against the State Government to the land or to the possession of it; (d) an order that all memorials in the Register of Land Titles and the Government *Gazette* evidencing the re-entry be expunged. The sole issue which determined the instant appeal against the High Court's decision was whether the damages awarded by the High Court was sustainable solely on the basis of the declaration that the re-entry was unlawful, invalid and null and void. The respondent argued that the said declaration was sufficient to entitle the respondent to damages/compensation under art 13 of the Federal Constitution for being unlawfully deprived of its land. The appellants, however, submitted that since the High Court did not annul or set aside the re-entry/forfeiture of the land and also did not make an order, pursuant to proviso (b) of s 29(1) of the Government Proceedings Act 1956 ('the GPA'), declaring that the respondent was entitled as against the State Government to the land or to the possession of it, there was no basis in law for the award of the damages.

Held, unanimously allowing the appeal and setting aside the High Court's decision on damages:

(1) It was clear from the orders sought by the respondent in paras (c)–(f) of its re-amended statement of claim that its action against the appellants was a proceeding against the State Government for 'recovery' of land or to the possession thereof. If the prayers in those paragraphs had been granted, the High Court could have, pursuant to proviso (b) of s 29(1) of the GPA made a declaration that the respondent was 'entitled' as against the State Government to the land or to the possession thereof, without making an order for actual recovery or physical possession of the land. The High Court judge consciously declined to make such an order although, in law, such an order should have been made for the respondent to seek further consequential relief; it would have provided the basis for the respondent to claim for damages (see paras 42–43 & 48).

(2) Contrary to the respondent's contention, proviso (b) of s 29(1) of the GPA did not say that the court could only make the order if the government was in possession of the land. It merely said that the court could not make an order for the recovery of the land to the plaintiff. This was consistent with the legislative scheme of the provision and did not in

any way result in an absurdity. The fact that the land had been registered in SEDC's name was of no consequence as the respondent was not asking for physical recovery or delivery of the land but only for a declaration that it was 'entitled' as against the State Government to the land or to the possession thereof (see paras 44–46).

(3) By electing not to appeal or cross-appeal against the High Court's refusal or failure to grant the declaratory order pursuant to proviso (b) of s 29(1) of the GPA, the respondent must be taken to have accepted that it was not entitled as against the State Government to the land or to the possession thereof. Without such a declaratory order and without an order that the re-entry upon the land be set aside or annulled, there was no basis for the respondent to claim for damages on the premise that it had been deprived of the land. The award of damages by the High Court was, therefore, not sustainable in law (see paras 50–51).

(4) This court agreed with the appellants that the effect in law of the High Court merely declaring that the re-entry upon the land was unlawful, invalid and null and void coupled with the respondent's failure to secure the other declarations that it had prayed for in its re-amended statement of claim were that: (a) there was an invalid administrative act or decision on the part of the second defendant who had a public duty to administer the provisions of the Land Code; (b) the re-entry or forfeiture of the land was not set aside. Therefore, the land became State land in accordance with s 33A(4) of the Land Code and came under the control of the State Government by reason of s 12 of the said Code; (c) without the order pursuant to proviso (b) of s 29(1) of the GPA, there was no legal foundation for any claim for damages for deprivation of the land. If such order had been granted, there would have been 'deprivation of property' to enable the respondent to claim compensation by virtue of art 13 of the Federal Constitution read with s 197 of the Land Code; (d) the damages granted by the High Court was not for invasion of the respondent's property rights as there was no declaration that the re-entry was an invasion of the respondent's property; (e) damages was awarded in terms of prayer (g)(ii) of the re-amended statement of claim and not for breach of art 13 of the Federal Constitution because: (i) the High Court never declared that the re-entry or forfeiture was a 'deprivation of property rights' of the respondent (even though the respondent had sought such a declaration; (ii) the damages awarded was for the value of the land which the respondent complained it had lost; and (iii) the forfeiture of the land was not unlawful as it was not set aside by the High Court and was a forfeiture that was authorised by law and was, therefore, not a deprivation of property (see para 52).

(5) Based on the facts and circumstances of the case, the respondent had no proprietary rights over the land and therefore the question of being

deprived of such rights did not arise at all. Even though the High Court had ruled that the re-entry upon the land was unlawful, invalid and null and void, the question whether the re-entry gave rise to an award of damages did not depend on the unlawfulness or invalidity of the re-entry alone, but whether the respondent was entitled as against the State Government to the land or to the possession thereof (see paras 59–60).

(6) The respondent was not entitled to the land and had not been unlawfully deprived of the same as the land had been forfeited to the State Government and the forfeiture order was not set aside or annulled by any court and the respondent elected not to appeal against the failure of the High Court to set aside the forfeiture order. Further, and in any case, no allegation of misfeasance in public office or negligence was pleaded or proven against the second defendant to entitle the respondent to damages for the re-entry upon the land. The respondent was therefore not entitled to the relief of monetary damages based solely on the declaration that the re-entry was unlawful, invalid and null and void (see paras 61–62).

(7) The respondent was granted relief against forfeiture on condition that it provided a RM12,758,941 cash deposit as security for the completion of the Jade Hotel but it failed to comply with that condition. The State Government's decision to impose that condition was never set aside or nullified or declared invalid by the High Court or quashed through judicial review proceedings. The High Court merely found the condition to be unreasonable but fell short of setting it aside. The alleged loss of the land was, in the circumstances, caused by the respondent itself in failing to comply with the condition for the grant of relief against forfeiture and the High Court did not see it fit to set aside or annul the forfeiture order or the re-entry upon the land. The forfeiture order therefore remained a valid order and for that reason, the respondent was not 'entitled' as against the State Government to the land or to the possession thereof within the meaning of proviso (b) of s 29(1) of the GPA (see paras 6 & 63–66).

[Bahasa Malaysia summary

Selepas menjadi pemilik berdaftar sebidang tanah pada tahun 1988, responden memperoleh kelulusan pihak berkuasa tempatan untuk membina sebuah hotel di atas tanah tersebut. Atas sebab tertentu, pembinaan tersebut ditinggalkan dan tapak yang sebahagiannya dibina menjadi tersumbat, menganggu pemandangan dan mendatangkan gangguan. Pada tahun 1995, selepas tanah tersebut diisytiharkan sebagai termasuk dalam Kawasan Pembangunan Khas iaitu; 'Segitiga Emas' Kuching, Penguasa Tanah dan Survey, Bahagian Kuching ('Penguasa') menurut s 33A Kanun Tanah Sarawak ('KTS') yang baru digubal pada masa itu, memberitahu responden bahawa dia akan mengambil semula pemilikan tanah tersebut jika kerja-kerja pembinaan di hotel tersebut tidak disambung semula dalam tempoh masa yang diberikan. Oleh kerana kegagalan

berterusan responden untuk meneruskan kerja-kerja pembinaan, Penguasa mengambil alih pemilikan tanah ('pengambilan semula') dan kemudiannya dijual secara bidaan awam kepada Perbadanan Pembangunan Ekonomi Sarawak ('SEDC'). Responden memfailkan tindakan di Mahkamah Tinggi untuk keputusan bahawa s 33A, yang hanya berkuat kuasa pada tahun 1994, tidak boleh digunakan secara retrospektif untuk melucutkan pemilikan tanah tersebut dan menafikan hak responden sebelum s 33A atau Ordinan Bangunan 1994 wujud. Mahkamah bersetuju dengan responden dan mengisytiharkan pengambilan semula tanah tersebut sebagai 'tidak sah dan terbatal'. Mahkamah memerintahkan defendan membayar responden RM11,340,640 sebagai nilai tanah pada tarikh pengambilan tanah, RM600,000 untuk penambahbaikan yang telah dilakukan ke atas tanah itu dan RM2.3 juta melalui ganti rugi teladan bersama faedah dan kos. Mahkamah tidak memberikan prayer lain yang dipohon oleh responden, iaitu: (a) suatu deklarasi bahawa pengambilan semula tersebut adalah pencerobohan hak proprietari responden sebagai pemilik berdaftar tanah; (b) suatu perintah yang mengenepikan pengambilan semula; (c) suatu deklarasi bahawa responden adalah pemilik sah tanah tersebut dan berhak terhadap Kerajaan Negeri terhadap tanah tersebut atau kepada pemilikannya; (d) suatu perintah bahawa semua pendaftaran di dalam Daftar Hakmilik Tanah dan *Warta* Kerajaan yang membuktikan pengambilan semula dihapuskan. Isu utama di dalam rayuan ini terhadap keputusan Mahkamah Tinggi adalah sama ada ganti rugi yang diberikan oleh Mahkamah Tinggi harus dikekalkan hanya berdasarkan deklarasi bahawa pengambilan semula adalah menyalahi undang-undang, tidak sah dan terbatal. Responden berhujah bahawa deklarasi tersebut adalah mencukupi untuk melayakkan responden mendapat ganti rugi/pampasan di bawah perkara 13 Perlembagaan Persekutuan kerana dilucutkan tanahnya secara tidak sah. Walau bagaimanapun, perayu menghujahkan bahawa oleh kerana Mahkamah Tinggi tidak membatalkan atau mengenepikan pengambilan semula/pelucuthakan tanah tersebut dan tidak membuat suatu perintah, menurut peruntukan (b) s 29(1) Akta Prosiding Kerajaan 1956 ('APK'), mengisytiharkan bahawa responden berhak terhadap Kerajaan Negeri terhadap tanah tersebut atau pemilikannya, yang mana tiada asas di dalam undang-undang untuk pemberian ganti rugi.

Diputuskan, sebulat suara membenarkan rayuan dan mengenepikan keputusan Mahkamah Tinggi untuk kerugian:

(1) Adalah jelas bahawa perintah yang dipohon oleh responden di dalam perenggan (c)–(f) pernyataan tuntutannya terpinda semula bahawa tindakannya terhadap perayu adalah prosiding terhadap Kerajaan Negeri untuk 'pengambilan semua' tanah atau kepada pemilikannya. Sekiranya perkara yang dipohon dibenarkan, Mahkamah Tinggi boleh, menurut peruntukan (b) s 29(1) APK membuat perisytiharan bahawa responden 'berhak' terhadap Kerajaan Negeri terhadap tanah tersebut, tanpa

membuat perintah untuk pengembalian sebenar tanah tersebut. Hakim Mahkamah Tinggi tidak membuat perintah sedemikian walaupun, dalam undang-undang, perintah sedemikian sepatutnya dibuat untuk responden mendapatkan relif seterusnya iaitu; tuntutan ganti rugi responden (lihat perenggan 42–43 & 48).

(2) Hujahan responden adalah tidak boleh diterima kerana, peruntukan (b) dari s 29(1) APK tidak menyatakan bahawa mahkamah hanya boleh membuat perintah tersebut sekiranya kerajaan memiliki tanah tersebut. Peruntukan tersebut menyatakan bahawa mahkamah tidak boleh membuat perintah untuk pengembalian tanah kepada plaintif. Hal ini konsisten dengan tujuan peruntukan tersebut dan tidak membawa kepada perkara yang sia-sia. Tanah tersebut telah didaftarkan atas nama SEDC dan tidak mendatangkan sebarang akibat disebabkan responden tidak memohon pengembalian secara tanah tersebut namun ianya hanya untuk pengisytiharan bahawa mereka 'berhak' terhadap Kerajaan Negeri terhadap pemilikan tanah tersebut (lihat perenggan 44 & 46).

(3) Dengan memilih untuk tidak merayu atau merayu silang terhadap keputusan Mahkamah Tinggi yang menolak perintah deklarasi di bawah peruntukan (b) s 29(1) APK, responden dianggap telah menerima keputusan tersebut dan tidak berhak terhadap tanah tersebut dari Kerajaan Negeri. Tanpa perintah deklarasi tersebut dan tanpa perintah bahawa pendaftaran semula ke atas tanah tersebut diketepikan atau dibatalkan, tiada asas bagi responden untuk menuntut ganti rugi atas pelucutan tanah tersebut. Oleh itu, pemberian ganti rugi oleh Mahkamah Tinggi adalah tidak boleh dipertahankan menurut undang-undang (lihat perenggan 50–51).

(4) Mahkamah ini bersetuju dengan perayu bahawa perintah deklarasi Mahkamah Tinggi yang mengistiharkan bahawa pendaftaran semula ke atas tanah tersebut adalah menyalahi undang-undang, tidak sah dan batal berserta penolakan deklarasi lain yang telah dipohon di dalam penyataan tuntutan terpinda semula kerana: (a) terdapat kesalahan keputusan pentadbiran oleh defendan kedua yang mempunyai tugas awam untuk melaksana peruntukan di dalam Kanun Tanah; (b) pendaftaran semula atau penyitaan tanah tersebut tidak diketepikan. Oleh yang demikian, tanah tersebut telah menjadi tanah Negeri menurut s 33A(4) Kanun Tanah dan di bawah kawalan Kerajaan Negeri menurut s 12 Kanun tersebut; (c) tanpa perintah menurut peruntukan (b) s 29(1)APK, tiada asas undang-undang untuk tuntutan kerugian atas pengambilan tanah tersebut. Sekiranya perintah tersebut diberikan, ianya baru boleh dikatakan 'pelucutan hak tanah' yang membolehkan responden memohon tuntutan ganti rugi menurut perkara 13 Perlembagaan Persekutuan dibaca bersama s 197 Kanun Tanah; (d) tuntutan kerugian dibenarkan oleh Mahkamah Tinggi bukan atas pencabulan hak

responden terhadap tanah tersebut kerana tiada deklarasi pendaftaran semula tanah tersebut adalah pencabulan hak responden atas tanah tersebut; (e) ganti rugi telah dibenarkan menurut perenggan (g)(ii) penyataan tuntutan terpinda semula dan bukan kerana bercanggah dengan perkara 13 Perlembagaan Persekutuan kerana: (i) Mahkamah Tinggi tidak pernah mengisytiharkan bahawa pendaftaran semula atau penyitaan tersebut adalah 'pelucutan hak tanah' responden (walaupun responden telah memohon perisytiharan sedemikian); (ii) ganti rugi yang diberikan adalah untuk nilai tanah yang responden menyatakan telah mengalami kerugian; dan (iii) penyitaan tanah tersebut tidak menyalahi undang-undang kerana ianya tidak diketepikan oleh Mahkamah Tinggi dan merupakan penyitaan yang sah disisi undang-undang dan bukan merupakan pelucutan hak harta (lihat perenggan 52).

(5) Berdasarkan fakta kes, responden tidak mempunyai hak proprietari ke atas tanah itu dan persoalan pelucutan hak tersebut tidak timbul sama sekali. Walaupun Mahkamah Tinggi telah memutuskan bahawa kemasukan semula ke atas tanah tersebut adalah menyalahi undang-undang, tidak sah dan batal, persoalan sama ada pendaftaran semula tersebut membolehkan tuntutan ganti rugi tidak bergantung kepada pelanggaran undang-undang mengenai pendaftaran semula sahaja, tetapi sama ada responden berhak menyaman Kerajaan Negeri atas tanah tersebut (lihat perengan 59–60).

(6) Responden tidak berhak mendapat tanah tersebut dan tidak dilucuthakan kerana tanah tersebut telah diserahkan kepada Kerajaan Negeri dan perintah penyitaan tersebut tidak diketepikan atau dibatalkan oleh mana-mana mahkamah. Responden juga memilih untuk tidak merayu terhadap keputusan Mahkamah Tinggi yang tidak mengenepikan perintah penyitaan tersebut. Selanjutnya, dan dalam apa jua keadaan, tiada tuduhan salahguna jawatan kerajaan atau kecuaian pegawai kerajaan diplidkan terhadap defendan kedua untuk membolehkan tuntutan ganti rugi bagi pendaftaran semula tanah tersebut. Oleh itu, responden tidak berhak mendapat relif ganti rugi dalam bentuk pampasan wang hanya berdasarkan deklarasi bahawa pendaftaran semula adalah menyalahi undang-undang, tidak sah dan terbatal (lihat perenggan 61–62).

(7) Relif yang dibenarkan kepada responden adalah mengenai penyitaan dengan syarat deposit tunai RM12,758,941 sebagai jaminan untuk menyiapkan Hotel Jade tetapi ianya gagal dipatuhi. Keputusan Kerajaan Negeri untuk mengenakan syarat tersebut tidak pernah diketepikan atau dibatalkan atau diisytiharkan tidak sah oleh Mahkamah Tinggi atau dibatalkan melalui prosiding semakan kehakiman. Mahkamah Tinggi hanya mendapati syarat tersebut tidak munasabah tetapi tidak mengenepikannya. Kerugian tanah tersebut adalah disebabkan oleh

responden sendiri kerana gagal mematuhi syarat untuk pelepasan terhadap pelucuthakan tanah tersebut dan Mahkamah Tinggi tidak berpendapat ianya sesuai untuk diketepikan atau dibatalkan perintah pelucuthakan atau pendaftaran semula ke atas tanah tersebut. Oleh itu, perintah penyitaan tersebut kekal sebagai perintah yang sah dan responden tidak 'berhak' terhadap Kerajaan Negeri terhadap tanah terhadap atau kepada pemilikannya menurut peruntukan (b) s 29(1) APK (lihat perenggan 6 & 63–66).]

Cases referred to

Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor [1997] 1 MLJ 418, HC (refd)

Ahmad Saidi bin Md Isa v Timbalan Menteri Hal Ehwal & Ors [2006] 3 MLJ 208; [2006] 1 CLJ 977, CA (refd)

Ee Chong Pang & Ors v The Land Administrator of the District of Alor Gajah & Anor [2013] 2 MLJ 16, CA (refd)

Haji Jaafar bin Haji Hashim & Ors v Rohani bte Ab Latip [2006] 4 MLJ 277, HC (refd)

Majlis Perbandaran Pulau Pinang v Syed Ahmed a/l MM Gouse Mohamed [2007] 1 MLJ 42, CA (refd)

Mengsina Sdn Bhd & Anor v The Sabah State Government & Anor [2013] 5 BLR 239 (refd)

Mohd Khir bin Toyo v PP [2015] 5 MLJ 429; [2015] 8 CLJ 769, FC (refd)

Ng Kim Moi (P) & Ors v Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, proposed intervenors) [2004] 3 MLJ 301; [2004] 3 CLJ 131, CA (refd)

Olive Casey Jaundoo v Attorney-General of Guyana [1971] AC 972, PC (refd)

Pemungut Hasil Tanah Daerah Barat Daya, Penang v Kam Gin Paik & Ors [1986] 1 MLJ 362; [1986] 1 CLJ 283, PC (refd)

Pengerusi Suruhanjaya Pilihanraya Malaysia v See Chee How & Anor [2015] MLJU 1831; [2015] 8 CLJ 367, CA (refd)

Pow Hing & Anor v Registrar of Titles, Malacca [1981] 1 MLJ 155, FC (refd)

Superintendent of Lands and Surveys, Kuching Division & Ors v Kuching Waterfront Development Sdn Bhd [2009] 5 MLJ 607; [2009] 6 CLJ 751, CA (refd)

Vincent Gadalon v Government of the State of Sabah & Anor [2010] MLJU 1483, HC (refd)

Wong Kee Sing Reality Sdn Bhd & Ors v The Collector of Land Revenue, District of Gombak [1995] MLJU 187, HC (refd)

Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors [2000] 3 MLJ 699, CA (refd)

Legislation referred to

Buildings Ordinance (Cap 8)

Federal Constitution arts 4, 13

A Government Proceedings Act 1956 s 29, 29(1), (1)(b)
Land Code (Cap 81) ss 12, 33A, 33A(4), 197, 200(e), 201
Specific Relief Act 1950 s 54

Appeal from: Suit No 21–6–08-III (High Court, Kuching)

B *JC Fong (with Mohd Adzrul bin Adzlan and Voon Yan Sin) (Sarawak State Attorney General's Chambers) for the appellants.*
Tan Thiam Teck (with Paul Tang Nguong Wee and Rodney Voon See Yang) (Tan & Lim) for the respondent.

C **Abdul Rahman Sebli JCA (delivering judgment of the court):**

[1] We heard arguments on 22 August 2017 and reserved judgment to a date to be fixed. We have now reached a unanimous decision and this is our judgment. For convenience, we shall refer to the parties as they were in the court below, namely the appellants as defendants and the respondent as plaintiff.

[2] The appeal by the defendants was against the whole decision of the learned judicial commissioner ('JC') granting the following reliefs to the plaintiff, Kuching Waterfront Development Sdn Bhd:

(1) A declaration that the purported re-entry of Lot 276 Section 48 Kuching Town Land District ('the land') by the second defendant was unlawful, invalid, null and void;

(2) An order that the first, second and fourth defendants to pay to the plaintiff as compensation the sum of RM11,340,640 being the value of the land as at the date of re-entry on 13 February 2006 and improvement on the land in the sum of RM600,000 with interest at the rate of 5%pa from 13 February 2006;

(3) An order that the first, second and fourth defendants to pay to the plaintiff exemplary damages of RM2,268,128 which represented 20% of the value of the land with interest at the rate of 5%pa from 13 February 2006 till full payment; and

(4) An order that the first, second, third and fourth defendants to pay global costs of RM200,000 to the plaintiff.

[3] The grant of reliefs (2), (3) and (4) was consequential upon the grant of relief (1), which relates to the first part of prayer (a) of the re-amended statement of claim. Except for prayer (g)(ii), which was pleaded in the alternative and prayer (i) of the re-amended statement of claim, the rest of the prayers were not granted by the High Court and no appeal or cross-appeal was filed by the plaintiff against the decision.

[4] By electing not to appeal against the decision, the plaintiff is deemed to accept that it was not entitled to those reliefs that were not granted by the High Court. The reliefs sought but which were not granted by the High Court were the following:

(a) The second part of prayer (a), namely a declaration that the re-entry of the land was an invasion of the right of property of the plaintiff as the registered proprietor of the land, and/or wrongful act;

(b) An order that the purported re-entry of the land by the second defendant be set aside;

(c) An order that the memorial of the second defendant's unlawful and invalid re-entry of the land made on the register which is null and void, and/or a wrongful act be expunged from the Register;

(d) An order that the document entitled 'Certificate of Re-entry' dated 13 February 2006 in respect of the unlawful and invalid re-entry of the land by the second defendant which is null and void and/or a wrongful act, be expunged from the Sarawak Government *Gazette* and be set aside;

(e) An order declaring that the plaintiff is still the legal and beneficial owner and/or the registered proprietor of the land;

(f) An order declaring that the plaintiff is entitled as against the fourth defendant to the land and/or to the possession thereof;

(g) Alternatively,

(i) a declaration that ss 200(e) and 201 of the Land Code, Sarawak Cap 81 ('the Land Code') are inconsistent with arts 13(1) and 13(2) of the Federal Constitution and are null and void;

(ii) ...

(h) In the further alternative, that this Honourable Court should apply the provisions of sections 200(e) and 201 of the Land Code with such modification as may be necessary to bring these to accord with the provisions of the Federal Constitution, in particular Article 13 thereof:

(i) ...

(j) A declaration that:

(i) Section 33A(6) of the Land Code, in so far as it makes provision for the third defendant to grant relief against forfeiture is inconsistent with the State Constitution of Sarawak and is void;

(ii) The third defendant has no power or right to determine whether to grant any relief against forfeiture and/or to impose any condition in relation thereto; and

(iii) The so-called condition imposed by the third defendant that the plaintiff deposit a cash bond of RM12,788,941 with the Dewan Bandaraya Kuching Utara is unlawful, invalid, null and void; and

(iv) The cash bond of RM12,788,941 imposed by the third defendant is in any event, arbitrary, unreasonable and grossly excessive having regard to its intended purpose;

(k) General damages against the first, second, third and fourth defendants jointly and severally for:

(i) The additional cost and expense to be incurred by the plaintiff to undertake and complete the development of the land; and

(ii) Loss of profits due to the:

(a) delay in the construction and completion of the development of the land because of the unlawful, invalid, null and void re-entry of the land by the second defendant and/or the unlawful, invalid, null and void condition imposed by the third defendant that the plaintiff deposit a cash bond of RM12,788,941 with Dewan Bandaraya Kuching Utara, which sum is arbitrary, unreasonable and grossly excessive in any event; and

(b) additional cost and expense to be incurred by the plaintiff to undertake and complete the development on the land;

(l) Aggravated damages against the first, second, third and fourth defendants jointly and severally.

[5] To provide context to the issues raised, we think it is necessary to set out the chronology of events leading to the filing of this action by the plaintiff. They are as follows:

25 May 1988	—	The plaintiff became the registered proprietor of the land.
28 November 1989	—	The plaintiff subleased the land to Jade Hotel Sdn Bhd on a monthly rental of RM30,000 from 28 November 1989 to 10 August 1991.
7 January 1991	—	Dewan Bandaraya Kuching Utara or DBKU (successor to Kuching Municipal Council) vide letter dated 7 January 1991 approved the building plan for Jade Hotel to be built on the land with conditions as specified in the schedule to the letter.
7 December 1991	—	The plaintiff commenced construction of Jade Hotel.
23 June 1994	—	Section 33A of the Land Code came into force.
27 May 1995	—	The land became a Special Development area vide Land Code (Special Development Area) Notification 1995.

22 September 1995	—	The plaintiff was served with the notice from the Lands and Surveys Department stating that it had not complied with s 33A of the Land Code.
30 November 1995	—	Letter from the plaintiff's solicitors to the Director of Lands and Surveys, explaining why works were abandoned and giving assurance that works on Jade Hotel would resume.
19 December 1996	—	The plaintiff's architect submitted to the Lands and Surveys Department for approval a proposed Waterfront cum commercial complex on the land.
26 December 1996	—	The plaintiff's solicitors Cheng & Associates vide letter dated 26 December 1996 (exh G12) to the Lands and Surveys Department gave 'reassurance' that the plaintiff was 'seriously working towards the recommencement of construction works' on the land.
27 April 2000	—	The Lands and Surveys Department informed the plaintiff that its plan for the Waterfront Suites etc was not approved.
29 March 2005	—	The plaintiff vide letter dated 29 March 2005 (exh G25) informed the Lands and Surveys Department that DBKU's approval for building plans for Jade Hotel had lapsed. No effort was made by the plaintiff to re-validate the plans.
29 April 2005	—	The plaintiff wrote letter dated 29 April 2005 (exh G26) to the Lands and Surveys Department to seek planning approval for a hotel cum commercial complex on the land with 'sky bridge' to connect the proposed hotel cum commercial complex with an adjacent building.
27 September 2005	—	The plaintiff was notified that its application for the hotel cum commercial complex was not approved.
10 October 2005	—	The plaintiff was served with a Final Notice to resume works for Jade Hotel. On receipt of the Notice, the plaintiff started to do de-watering but on 31 December 2005, the site was still filled with water.

13 February 2006	—	The land was re-entered by the second defendant, the requisite memorial entered in the Register and the Certificate of re-entry was issued. The basis for the re-entry of the land was that the plaintiff had not resumed works for the construction of Jade Hotel. On this date, the building plan for Jade Hotel which had expired had not been revalidated.
23 October 2009	—	The land was put up for sale by tender and was purchased by Sarawak Economic Development Corporation (SEDC).
29 June 2010	—	SEDC became the registered proprietor of the land.

[6] The following facts are also relevant:

(a) the document of title to the land was imposed with the following special condition:

> The erection of a building or buildings shall be in accordance with detailed drawings and specifications approved by the Kuching Municipal Council and shall be completed within 5 years from date of registration of this Lease.

(b) the land is located in the 'Golden Triangle' of Kuching, being within the Kuching Waterfront;

(c) the building plan for Jade Hotel which was approved by the relevant authorities in December 1991 had lapsed but the hotel was not completed within the stipulated period as prescribed in the special condition of title to the land;

(d) prior to 1995, building works for Jade Hotel stopped after excavation of the land for the basement carpark and the excavated site was full of water and had become a public nuisance. The site was filled with water on the date of re-entry on 13 February 2006;

(e) by the end of 2005, when the plaintiff alleged that the building works for Jade Hotel had re-commenced, the approval plan for the building granted in 1991 had lapsed;

(f) the plaintiff, through its then advocate, Messrs Tang & Partners submitted a petition for relief against forfeiture under s 33A of the Land Code to the Majlis Mesyuarat Kerajaan Negeri ('MMKN');

(g) MMKN had granted the plaintiff relief against forfeiture on condition the plaintiff provided a cash deposit of RM12,758,941 as security for the completion of Jade Hotel, failing which the said sum would be used to

either complete the structure or to demolish the uncompleted structure and to beautify the land located in a special development within the Kuching 'Golden Triangle'; and

(h) the plaintiff failed to provide the cash deposit of RM12,758,941 as security.

[7] As for the issues to be tried by the High Court, the parties had agreed to the following:

1(a) Whether s 33A of the Land Code, Sarawak Cap 81 ('the Land Code') is applicable when a registered proprietor of land, within an area which has been declared to be a special development area pursuant to s 11 of the Land Code, had obtained approval for the erection of a building on the land prior to the enactment of the Buildings Ordinance, 1994 Cap.8 ('the Buildings Ordinance').

1(b) In the event the answer to question 1(a) is 'Yes', whether the second defendant had complied with the provisions of section 33A of the Land Code in re-entering the land.

1(c) Whether the plaintiff had resumed works for the construction of Jade Hotel on the land.

1(d) In the event the answer to:

(i) Question 1(a) and/or Question 1(b) is 'No', or

(ii) Question 1(c) is 'Yes',

what are the effects or consequences arising therefrom and what are the remedies available to the plaintiff.

2(a) Whether section 33A(6) of the Land Code is null and void as being contrary to or inconsistent with the State Constitution of Sarawak.

2(b) Does the third Defendant have the power to determine whether to grant relief against the forfeiture and/or to impose conditions for the grant of such relief, and if so, what are the limitations (if any) on any condition imposed on the grant of such relief.

2(c) Whether the imposed condition for relief against forfeiture of the land of a cash deposit of RM12,758,941 was reasonable.

2(d) Whether in the circumstances of this case, any challenge to the 'reasonableness' of the conditions imposed by the third Defendant for grant of relief against forfeiture, could only be proceeded by way of judicial review.

[8] After a full trial of the action, the High Court's answers to the agreed issues were as follows:

Issue 1(a) — Negative, meaning to say section 33A of the Land Code was not applicable when the plaintiff as the registered proprietor of the land had obtained

A approval for the erection of Jade Hotel prior to the enactment of the Buildings Ordinance.

Issue 1(b) — Negative, meaning to say the second defendant did not comply with the provisions of section 33A of the Land Code when he re-entered the land on 13 February 2006.

B

Issue 1(c) — Affirmative, meaning to say the plaintiff had resumed works for the construction of Jade Hotel on the land.

Issue 1(d) — In view of the answers to Issues 1(a), 1(b) and/or 1(c) as the re-entry of the land was unlawful, invalid, null and void, the plaintiff was entitled to the following reliefs:

C

(i) a declaration that the purported re-entry of the land by the second defendant on 13 February 2006 was unlawful, invalid and null and void;

(ii) an order that the first, second and fourth defendants do pay the plaintiff: (a) RM11,340,640 which is the value of the land as at 13 February 2006 and the improvements on the land in the sum of RM600,000; (b) exemplary damages of 20% of the value of the land; (c) interest at the rate of 5%pa on the RM11,340,640 and RM600,000 and the exemplary damages as from 13 February 2006 till full payment;

D

E

(iii) the first to fourth defendants to pay global costs of RM200,000 to the plaintiff.

Issue 2(a) — Not necessary to answer as the petition for relief against forfeiture or re-entry was only applicable if there had been a valid forfeiture or re-entry, which was not the case here.

F

Issue 2(b) — Affirmative if there was a valid forfeiture or re-entry pursuant to section 33A.

Issue 2(c) — Negative, meaning to say the imposition of the condition for relief against forfeiture of the land of a cash deposit of RM12,788,941 was unreasonable.

G

Issue 2(d) — Negative, meaning to say any challenge on the 'reasonableness' of the conditions imposed by the third defendant for the grant of the relief against forfeiture need not be done by way of judicial review only.

[9] In so far as issue 1(a) is concerned, the focal point of disagreement H between the parties was over the question whether s 33A of the Land Code, which came into force on 23 June 1994, operates retrospectively. If it does, the plaintiff would be subject to the terms of the provision. It would be otherwise if it does not. The provision is couched in the following language:

I

Section 33A Re-entry of land within special development areas

(1) Where the proprietor of any land, within an area which has been declared to be special development area pursuant to section 11 —

(a) had obtained approval under the Buildings Ordinance, 1994 [Cap 8], for the erection of a building on his land, but —

(i) fails, within a period of two years from the date of such approval, to commence the construction of the building; or

(ii) after having commenced the construction thereof, abandons, ceases or discontinues works necessary for the completion of the construction of the building; or

(b) has on his land a building which has been left in a state of ruin, disrepair or collapse so as to cause nuisance, danger or inconvenience to the public,

the Superintendent may, with the approval of the Director, by notice served on the proprietor, require him within such period (being not less than sixty days) as may be stipulated in the notice —

(A) to commence the construction of the building;

(B) to resume works for the construction thereof;

(C) to continue such works until the due completion of the building; or

(D) to demolish any building which has been left in a state of ruin, disrepair or collapse.

(2) In the event that the proprietor fails to comply with the requirements of the notice issued pursuant to subsection (1), the Superintendent shall be entitled to —

(a) enter into possession of the land;

(b) demolish any structure, including the uncompleted building thereon or to take such steps as may be necessary to beautify, landscap or improve the land; or

(c) carry on such works on the said land as the Superintendent deems necessary to remove any nuisance, health or fire hazards, annoyance or inconvenience that may be caused to the public by reason of any structure, uncompleted building or vegetation thereon,

and the Superintendent shall recover the costs and expenses thereby incurred from the proprietor as a civil debt.

(3) If the proprietor shall fail to pay the cost and expenses referred to in subsection (2) within thirty days from the date of the notice being served on him by the Superintendent, the Superintendent shall be entitled to forthwith re-enter the land in accordance with this section.

(4) On the date of re-entry of the land, the Superintendent shall cause to be entered in the Register a memorial that the land had been re-entered by him on behalf of the Government, and upon the entry of such memorial, the interest and estate of the proprietor and any other interest registered against the land, shall be terminated, and the issue document of title for the land shall be deemed to have been cancelled and no claims shall lie against the Government for the refund of any rents or other moneys paid in respect thereof.

(5) The Superintendent shall, upon the entry of the memorial on the Register, forthwith issue the certificate or re-entry which shall be served upon the proprietor and published in the *Gazette*.

A (6) The proprietor and any person having an interest registered against the land at the date of the re-entry and resumption of possession by the Government, may within a period of sixty days from the date of the publication of the certificate in the Gazette pursuant to subsection (5), petition to the Majlis Mesyuarat Kerajaan Negeri to grant him or them relief against forfeiture.

B (7) Section 33(7) shall, with the necessary modifications, apply in regard to any petition presented pursuant to subsection (6).

[10] The learned JC accepted the plaintiff's contention that the provision C does not operate retrospectively, hence the grant of the first part of prayer (a) of the re-amended statement of claim. His Lordship's reasoning is expressed at p 31 of the grounds of judgment, as follows:

[44] I am of the view the specific of s 33A LC are that the said land is within the Special Development Area (SDA) pursuant to s 11 LC and the proprietor had D obtained approval under the BO for the erection of a building. In the instant case the plaintiff had already obtained the approval to erect the Jade Hotel prior to the enactment of the BO. The plaintiff's right to the said land and the right to build the Jade Hotel was based on the earlier approval that was given for the construction of the Jade Hotel vide LSD's letter dated 2 April 1990 and the approved building plan E granted by LSD on 21 December 1990, BOMBA dated 24 December 1990 and DBKU dated 7 January 1991 (see PW1A exh G5, G6 and G7). Both the plaintiff's right to the said land and the right to build Jade Hotel based on the Approval to construct Jade Hotel vide LSD's letter dated 2 April 1990 and the approved building plan granted by LSD on 12 December 1990, BOMBA dated 24 December 1990 and DBKU dated 7 January 1991 (see PW1A exh G5, G6 and G7) are F substantive rights.

[45] It is not expressly stated in s 33A that it is to apply retrospectively. An example of this is the provision of s 2 Land Ordinance (Cap 27) which stated: 'The provisions of this Ordinance shall be retrospective, unless the context of any section clearly indicates a contrary intention'. I am therefore of the view that the Legislature G did not intend s 33A to be retrospective because the Legislature is presumed to know all the relevant law upon the particular subject upon which it legislates (see *Lim Phin Kian*).

[46] It has also been held prima facie, a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is H unavoidable on the language used (see *Superintendent of Lands & Surveys Miri Division v Madeli bin Salleh* [2008] 2 MLJ 677 at p [32]). I now ask, what is the plaintiff's right here that is affected by s 33A? To me it's the plaintiff's rights to the said Land and to construct the Jade Hotel based on the said Approval approved in 1990 which I have alluded to above in my discussion on the status of the said Land I pre s 33A and post s 33A.

[47] I also cannot accede to the defendant's contention that s 33A is retrospective because if it is, it would impair the plaintiff's right and obligation to build the Jade Hotel pursuant to the earlier approval which did not impose the kind of stringent conditions as that of s 33A where the plaintiff must commence construction of the

Jade Hotel within two years from the date of approval and continue to do so continuously otherwise the said Land can be forfeited if the conditions for forfeiture in s 33A are fulfilled.

[11] The reference to the 'BO' by the learned JC in the above passages is a reference to the Buildings Ordinance. So, there were two reasons given by the learned JC for holding that s 33A of the Land Code does not operate retrospectively. First, because it is not expressly stated in s 33A itself and second, a retrospective application of the provision will impair the plaintiff's rights and obligations under the earlier approval, ie before the coming into force of the provision. This finding is of course the subject of serious challenge by the defendants in the present appeal.

[12] At the outset of the hearing of this appeal, Datuk Sri JC Fong for the defendants raised the question whether on the basis of a single declaration made by the learned JC, the award of damages could be sustained, given the fact that neither misfeasance in public office nor negligence was pleaded or alleged by the plaintiff.

[13] In view of the importance of the question, which in our opinion would determine the course of this appeal, we directed the parties to address the court on the following question of law:

Whether, by the declaration in prayer (a) of the re-amended statement of claim, the relief of monetary damages can be sustained in law.

[14] We indicated to the parties that we shall deal with this point first, and that if the point is decided in favour of the defendants, there would be no necessity for us to deal with the other issues. Parties have since filed their additional written submissions on the issue, for which we are grateful. For ease of reference we reproduce below the whole of prayer (a) of the re-amended statement of claim, the first part of which was the sole declaration granted by the learned JC, followed by the orders made in respect thereto:

Prayer (a)

a declaration that the purported re-entry of that parcel of land situated at Jalan Tunku Abdul Rahman, Kuching containing an area of 1,516 square metres, more or less, and described as Lot 276 Section 48 Kuching Town Land District [hereinafter referred to as 'the Land'] by the second Defendant is unlawful, invalid, null and void, an invasion of the right of property of the plaintiff as the registered proprietor of the Land and/or a wrongful act.

The orders made

(i) A declaration that the purported re-entry of the land by the second

A Defendant was invalid, null and void.
(Note that the second part of prayer, ie that the re-entry was an invasion of the right of the plaintiff as the registered proprietor of the land was not granted.)

B (ii) An order that the first, second and fourth defendants do pay the plaintiff as compensation the sum of RM11,340,640.00 being the value of the land as at the date of the re-entry on 13.2.2006 and the improvements on the land in the sum of RM600,000.00 with interest at the rate of 5% per annum from 13.2.2006 till full payment;

C (iii) An order that the first, second and fourth defendants do pay to the plaintiff exemplary damages of RM2,268,128.00 amounting to 20% of the value of the land with interest at the rate of 5% per annum from 13.2.2006 till full payment; and

(iv) An order that the first, second, third and fourth defendants do pay global costs of RM200,000.00 to the plaintiff.

D

[15] The nub of the plaintiff's argument in relation to the question posed was that since the plaintiff's claim for compensation for the value of the land (valued as at 13 February 2006) was not dependent on the grant of any of the E declaratory reliefs that the High Court did not grant, ie the second part of para (a) through to paras (b)–(f) of the re-amended statement of claim, the award of damages by the learned JC, based as it was on the alternative prayers, was perfectly in order.

F **[16]** To better appreciate the plaintiff's argument on the issue, we reproduce below verbatim what learned counsel said in his written submissions:

4.1 The reliefs sought by the Respondent are stated in paragraph 17 of the learned JC's Judgment.

G 4.2 The Respondent's claim is pleaded as an alternative claim to the declaratory reliefs and other related orders sought in paragraph 17(a) to (f) of the Judgment.

See: para 17(a) to (g) of Judgment; R/P (T) pgs 21–23.

4.3 In other words, the Respondent's claim for compensation for the value of the H Land in this case is not dependent on any of the declaratory reliefs or orders stated in paragraph 17(a) to (f) of the Judgment being granted. For ease of reference, the declaratory reliefs and orders in paragraph 17(a) to (f) of the Judgment are reproduced below:

(a) a *declaration* that the purported re-entry of the Land by second Appellant I is unlawful, invalid, null and void, an invasion of the right of the plaintiff as the registered proprietor of the Land and/or a wrongful act;

(b) an *order* that the purported re-entry of the Land by the second Appellant be set aside;

(c) an *order* that the memorial of the second Appellant's unlawful and invalid

re-entry of the Land made on the register is null and void, and/or a wrongful act be expunged from the Register;

(d) an *order* that the document entitled 'Certificate of Re-Entry' dated the 13th February, 2006 in respect of the unlawful and invalid re-entry of the Land by the second Appellant is null and void and/or wrongful act, be expunged from the Sarawak Government Gazette and be set aside;

(e) an order *declaring* that the plaintiff is still the legal and beneficial owner and/or the registered proprietor of the Land;

(f) an *order* declaring that the Respondent is entitled as against the State Government to the Land and/or to the possession thereof.

[17] The alternative prayers referred to by learned counsel in the above submissions were prayers (g) and (h) of the re-amended statement of claim. They were in the following terms:

(g) alternatively,

(i) a declaration that sections 200(e) and 201 of the Land Code are inconsistent with Articles 13(1) and 13(2) of the Federal Constitution and are null and void;

(ii) an order that the fourth Defendant pay to the Plaintiff as compensation, the value of the Land as at 13th day of February 2006 with interest thereon until the date of full and final settlement;

(h) in the further alternative, that this Honourable Court should apply the provisions of sections 200(e) and 201 of the Land Code with such modifications as may be necessary to bring these to accord with the provisions of the Federal Constitution in particular Article 13 thereof.

[18] Plainly and obviously, the plaintiff was relying on para (g)(ii) of the alternative prayer to defend the compensation sum of RM11,340,640 awarded by the learned JC. As we mentioned, this sum represented the value of the land as at 13 February 2006, which the plaintiff claimed it had been deprived of when the second defendant re-entered the land on 13 February 2006. It was not, it will be noted, damages for invasion of the plaintiff's rights as the registered proprietor of the land as sought for under para (i) of the re-amended statement of claim, which reads:

(i) damages against the second and fourth Defendants jointly and severally in respect of the second Defendant's invasion of the right of property of the Plaintiff as the registered proprietor of the Land;

[19] The award of the RM11,340,640 as compensation for the value of the land implies that the plaintiff had proprietary rights over the land and that it had been deprived of such proprietary rights when the second defendant re-entered the land on 13 February 2006.

[20] Having submitted that the plaintiff's claim for damages was not dependent on the grant of prayers (a)–(f) of the re-amended statement of claim, learned counsel in his oral submissions contended that the plaintiff's entitlement to damages was based on ss 197 and 201 of the Land Code, premised on the fact that the land has been registered in the name of SEDC who has indefeasible title to the land. The two provisions read as follows:

> Section 197
>
> Any person who is deprived of any land, or of any estate or interest therein, by reason of any of the provisions relating to indefeasibility contained in sections 132, 133 and 134 and who is by reason thereof barred from bringing an action against the registered proprietor for possession, or other action for the recovery of that land, estate or interest, may bring an action against the Government for recovery of damages.
>
> Section 201
>
> No person shall, as against the Government, be entitled to recover any greater amount for compensation in respect of the loss or deprivation of any land, or any estate or interest therein, than the value of that land, estate or interest at the time of that deprivation, together with the value of the permanent buildings erected thereon and any improvements made thereto prior to the time of that deprivation, with interest at the rate of five per cent per year to the date of judgment recovered.

[21] From a plain reading of s 197 read with s 201 above, it is obvious to us that in order to rely on that provision to claim for damages against the State Government, the plaintiff must first establish that it had been 'deprived' of the land or of any estate or interest in the land by reason of indefeasibility of title enjoyed by the registered proprietor of the land, namely SEDC.

[22] We enquired from learned counsel if the plaintiff's claim was pleaded in the manner that he submitted. He admitted that it was not pleaded in that manner but explained that this was because when the writ was filed in 2008, the defendants had yet to sell the land. It was only sold to SEDC in 2010. We noted however that no application was made by the plaintiff to amend the re-amended statement of claim to plead this cause of action.

[23] Be that as it may, learned counsel drew our attention to the position taken by the defendants at the hearing before this court of their appeal against the grant of the interlocutory injunction by the High Court where learned counsel for the defendants had submitted as follows:

> 7.5 So what the Respondent could be compensated, if (which is denied) the re-entry of the land was unlawful, would be the value of the land, like in those cases, where land owner loses his land as a result of government compulsory acquisition for public purpose.
>
> 7.6 The Respondent having in this Appeal, sought, and given an undertaking that

> the Appellants will not rely on s 200(e) of the Land Code as a defence, is assured of damages in the event the Respondents succeeds in proving its claim against the Appellants of unlawful re-entry of the land ...

[24] According to learned counsel, it was this 'assurance' by the defendants that persuaded this court to remove the interlocutory injunction restraining the sale, transfer and/or disposal of the land, as evident from the following passages of the judgment:

> [30] Indeed, we were initially perturbed by the near improbability of the respondent successfully obtaining damages from the government, due to the promulgation of s 200, especially para (e) of the Sarawak Land Code, despite a successful declaratory action ...
>
> [33] Our fears were allayed when the appellants conceded that they would never allude and advocate section 200(e) in order to defeat the respondent's case for damages. We were not unmindful that art 13 of the Federal Constitution would protect the rights of the respondents in any suit for damages against the Sarawak Government; with such assurances any fear of the respondent being deprived of compensation in any future proceedings had been dispelled.

[25] The defendants' position was repeated at the hearing before the Federal Court of the plaintiff's application for leave to appeal against the removal of the interlocutory injunction by this court, where the defendants in their written submission had stated:

> 6.12 Since there is no impediment (especially by reason of Article 13 of the Federal Constitution) to the Appellant's claim for damages, then the well established principle that 'where damages is an adequate remedy then no interlocutory injunction should normally be granted, however strong the Plaintiff's claim may be at that stage' ought to be upheld.

[26] Given the position taken by the defendants previously, it was submitted that there is no merit in the defendants' contention that since the High Court only granted a declaration that the re-entry by the second defendant was unlawful, invalid, null and void, the award of damages had no legal basis.

[27] What the plaintiff was saying in effect was that the defendants must not approbate and reprobate on the issue of the plaintiff's right to damages for the alleged unlawful re-entry of the land by the second defendant. In other words, since the defendants had conceded before this court and before the Federal Court prior to the trial of this action that the plaintiff could claim for damages if the re-entry of the land was proven to be unlawful, they must not recoil from that position.

[28] Learned counsel stressed the point that the unlawfulness of the re-entry

of the land by the second defendant on 13 February 2006 was proven not only at the retrial before the learned JC (from which the present appeal arose) but also at the original trial before David Wong Dak Wah J (as he then was) who found that the plaintiff had resumed works on the construction of Jade Hotel and had accordingly granted:

(a) a declaration that the re-entry by the second defendant was unlawful, invalid, null and void; and

(b) an order that the defendants pay to the plaintiff as compensation, the sum of RM11,340,640 being the value of the land as at the date of re-entry on 13 February 2006 as well as RM600,000 as costs for improvement of the land with interest thereon, and costs.

[29] It was submitted that as a necessary consequence to the court's finding that the re-entry of the land by the second defendant was unlawful, the plaintiff must, as a matter of course, be entitled to damages as it has been proven that the plaintiff was unlawfully deprived of its property without any compensation. The High Court case of *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418, which had been affirmed by this court and the Federal Court, was cited in support. The High Court in that case had, inter alia, held:

(a) it has long been recognized under our law that when a person is deprived of any proprietary right under an executive exercise pursuant to powers given by statute, that person must be compensated;

(b) since the defendants failed to establish the right to deprive the plaintiffs of their rights, the deprivation without compensation was unlawful, and the plaintiffs were entitled to the compensation in accordance with art 13 of the Constitution; and

(c) art 13 of the Constitution supersedes both statutory law and common law and mandates that all acquisition of proprietary rights shall be compensated and that any law made for the compulsory acquisition or use without compensation shall be rendered void by virtue of art 4 of the Constitution.

[30] So it is patently clear that the plaintiff's basis for saying that it had been deprived of the land was the fact that the re-entry of the land by the second defendant had been held by the court to be unlawful, invalid, null and void, which is the first part of prayer (a) of the re-amended statement of claim. This finding according to the plaintiff was confirmation that it was deprived of the land without any compensation. The contention was that:

(a) once a court makes a finding that a claimant's property was unlawfully acquired in contravention of the law and/or in breach of art 13 of the Federal Constitution, such claimant is entitled to compensation or damages; and

(b) it is not necessary to have a declaration or other order to justify an award of compensation or damages.

[31] For this proposition, reliance was placed on the following authorities: *Ng Kim Moi (P) & Ors v Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, proposed intervenors)* [2004] 3 MLJ 301; [2004] 3 CLJ 131; *Ee Chong Pang & Ors v The Land Administrator of the District of Alor Gajah & Anor* [2013] 2 MLJ 16; *Wong Kee Sing Reality Sdn Bhd & Ors v The Collector of Land Revenue, District of Gombak* [1995] MLJU 187; *Vincent Gadalon v Government of the State of Sabah & Anor* [2010] MLJU 1483; *Olive Casey Jaundoo v Attorney-General of Guyana* [1971] AC 972; *Mengsina Sdn Bhd & Anor v The Sabah State Government & Anor* [2013] 5 BLR 239; *Majlis Perbandaran Pulau Pinang v Syed Ahmed a/l MM Gouse Mohamed* [2007] 1 MLJ 42; and *Haji Jaafar bin Haji Hashim & Ors v Rohani bte Ab Latip* [2006] 4 MLJ 277.

[32] The defendants' answer to the point raised by the plaintiff was that the concession that they made at the hearing before this court in the injunction matter was merely to assure the court that they would not rely on s 200(e) of the Land Code to defeat the plaintiff's claim for damages. We were referred to the following statement by Suriyadi Halim Omar JCA (as he then was) in *Superintendent of Lands and Surveys, Kuching Division & Ors v Kuching Waterfront Development Sdn Bhd* [2009] 5 MLJ 607 at p 621; [2009] 6 CLJ 751 at p 771:

> [33] ... appellants conceded that they will never allude or advocate s 200(e) in order to defeat the respondent's claim to damages.

[33] It was further submitted that the concession must be read together with the other relevant passages in the said judgment on the prohibitions in s 29 of the Government Proceedings Act 1956 ('the GPA') and s 54 of the Specific Relief Act 1950. We were referred in particular to the following observations by Suriyadi Halim Omar JCA at p 619 (MLJ); pp 770–771 (CLJ) of the report:

> [24] With the presence of the above prevailing statutory prohibition, there was no prospect of the respondent recovering possession of the Land from the Government ...
>
> [29] To wind up all the above prohibitive provisions, the rationale of allowing the Government, any Government department or government servants to carry out its duties to the public, without fear of any unnecessary impediment, must be the

A many obvious reasons why the GPA and SRA have been so legislated in that manner.

[30] As regards the grievances of the respondent, we were of the view that, once the rights have been successfully established vide the declaration action, there was no impediment to the respondent to sue for damages. Indeed, we were initially perturbed by the near improbability of the respondent successfully obtaining damages from the government due to the promulgation of s 200, especially para (a) of the Sarawak Land Code ...

C **[34]** As for ourselves, we do not think that the point raised by the plaintiff is a point of real significance having regard to the whole scheme of things. In the first place, the concession by the defendants was made on the assumption that the re-entry of the land by the second defendant was unlawful. It was not an admission that the re-entry of the land was unlawful.

D **[35]** The truth of the matter is, both at the original trial before David Wong Dak Wah J and at the re-trial before the learned JC, and now before us, the defendants had been consistent in their stand that the re-entry of the land by the second defendant was not unlawful. In fact, it is a principal ground of E appeal in the present appeal against the decision of the learned JC.

[36] With regard to s 29(1)(b) of the GPA, it was pointed out by the defendants that what the plaintiff sought for in the present action was an order that the plaintiff was entitled as against the State Government to the land or to F the possession thereof. The learned JC at para 100 of his judgment referred to s 29(1)(b) but declined to make an order declaring that the plaintiff was entitled as against the State Government to the land or to the possession thereof.

G **[37]** It was submitted that without the order in terms of s 29(1)(b) of the GPA, coupled with the fact that the forfeiture of the land was not set aside or annulled by the court, there was no basis in law for the award of damages. It was argued that the forfeiture order remained in place at all material times and this H court has no jurisdiction to reverse the decision.

[38] Section 29(1)(b) of the GPA provides as follows:

I 29(1) In any civil proceedings by or against the Government the court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

Provided that —

(a) ...

(b) in any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property or to the possession thereof.

[39] Mr Tan Thiam Teck's answer to the defendants' argument was as follows:

(a) a s 29(1)(b) [of the GPA] declaratory order that the plaintiff is entitled as against the Government to the land or property or to possession thereof is an order *in lieu or in place* of an order for recovery of the land or delivery of the property against the Government;

(b) such declaratory order is designed to prevent a writ of possession from being issued against the Government in execution of a judgment for possession;

(c) a declaratory order under s 29(1)(b) of the GPA has nothing to do with an award of damages. In fact the words 'damages' and 'compensation' do not appear in the section;

(d) a s 29(1)(b) [of the GPA] declaratory order is applicable only where the Government has possession of the land. The section has no application if the Government is no longer in possession of the land;

(e) on the facts of the case, the Government is no longer in possession of the land. The Government had sold the land to SEDC even before the conclusion of the original trial before David Wong Dak Wah J. It is SEDC, as the registered proprietor of the land, who is in possession of the land and who has exercised its right of ownership over the land by arranging for an 18 storey hotel to be built on the land;

(f) since it is SEDC and not the Government who is in possession of the land, a s 29(1)(b) declaratory order was correctly not granted since the court will not act in vain or grant academic declarations (*Ahmad Saidi bin Md Isa v Timbalan Menteri Hal Ehwal & Ors* [2006] 3 MLJ 208; [2006] 1 CLJ 977 (CA)); and

(g) if the court were to grant a s 29(1)(b) [of the GPA] order on the presumption that the Government will comply with the order and return the land to the plaintiff, the court would not have granted an order of damages or compensation for the value of the land as it would have expected the Government to comply with the declaratory order and return the land to the respondent.

[40] Reference was made to the decision of this court in *Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors* [2000] 3 MLJ 699 where, in

relation to the proviso to s 29(1)(b) of the GPA, this is what the court said:

> The proviso is relevant to coercive proceedings to recover land from a government, be it Federal or that of a State, eg on the expiry of a tenancy. It is designed to prevent a writ of possession issuing against the government in execution of a judgment for possession.

[41] Proviso (b) to s 29(1) of the GPA speaks of 'any proceedings against the Government for the recovery of land or other property'. As rightly pointed out by learned counsel for the plaintiff, the proviso has nothing to do with the award of damages. The legislative intent behind the proviso is to prohibit the court from making an order for the recovery of land, but in lieu of making such order of recovery, the court may make an order that the plaintiff is 'entitled' as against the Government to the land or to the possession thereof.

[42] The question is whether the present action by the plaintiff was a proceeding by the plaintiff against the State Government for the 'recovery' of land or to the possession thereof. If it was, then the action would fall under s 29(1)(b) of the GPA. We have no doubt that it was, and this is clear from paras (c)–(f) of the re-amended statement of claim where the plaintiff sought for the following orders:

> (c) an order that the memorial of the second Defendant's unlawful and invalid re-entry of the Land made on the register as prescribed under the Land Code [hereinafter referred to as 'the Register'] which is null and void, and/or a wrongful act be expunged from the Register;
>
> (d) an order that the document entitled 'Certificate of Re-Entry' dated the 13th February, 2006 in respect of the unlawful and invalid re-entry of the Land by the second Defendant which is null and void and/or a wrongful act, be expunged from the Sarawak Government Gazette and be set aside;
>
> (e) an order declaring that the Plaintiff is still the legal and beneficial owner and/or the registered proprietor of the Land;
>
> (f) an order declaring that the Plaintiff is entitled as against the fourth Defendant to the Land and/or to the possession thereof.

[43] If these prayers had been granted, the High Court could have, pursuant to s 29(1)(b) of the GPA, made a declaration that the plaintiff was 'entitled' as against the State Government to the land or to the possession thereof, without making an order for actual recovery or physical possession of the land. Such order could then provide the basis for the plaintiff to claim for damages as a consequential relief.

[44] Contrary to what learned counsel for the plaintiff submitted, proviso (b) does not say that the court can only make the order if the Government is in possession of the land. It merely says that the court cannot make an order for

the recovery of the land to the plaintiff. This is not inconsistent with the legislative scheme of the provision and will not in any way result in an absurdity.

[45] In any event, even if learned counsel is right in his interpretation of s 29(1)(b), it will contradict the plaintiff's own pleaded case that it was entitled as against the State Government to the land or to the possession thereof, as pleaded in prayer (f) of the re-amended statement of claim.

[46] Clearly therefore the plaintiff's action against the defendants was a 'proceedings against the Government for the recovery of land' within the meaning of proviso (b) to s 29(1) of the GPA. The fact that the land is now registered in the name of SEDC is of no consequence as the plaintiff was not asking for physical recovery or delivery of the land but only for a declaration that it was 'entitled' as against the State Government to the land or to the possession thereof.

[47] Obviously, the land was in the possession of the State Government at the point of re-entry on 13 February 2006, which is the relevant point of time to determine whether the plaintiff was entitled as against the State Government to the land or to the possession thereof for the purposes of s 29(1)(b) of the GPA.

[48] There can be no argument that by virtue of s 29(1)(b) of the GPA, the learned JC had a discretion to make an order that the plaintiff was 'entitled' as against the State Government to the land or to the possession thereof, 'in lieu' of an order for recovery or delivery of the land to the plaintiff. But His Lordship consciously declined to make such order although in law such an order should have been made for the plaintiff to seek further consequential relief: See the decision of the Judicial Committee of the Privy Council in *Pemungut Hasil Tanah Daerah Barat Daya, Penang v Kam Gin Paik & Ors* [1986] 1 MLJ 362; [1986] 1 CLJ 283.

[49] In *Pow Hing & Anor v Registrar of Titles, Malacca* [1981] 1 MLJ 155 this is what Eusofee Abdoolcader J (as he then was) delivering the judgment of the then Federal Court said in relation to proviso (b) to s 29(1) of the Government Proceedings Ordinance:

> Even assuming for a moment for the sake of argument that setting aside a forfeiture under the Code would amount to proceedings against the Government of the State of Malacca for the recovery of land, what proviso (b) of s 29(1) of the Government Proceedings Ordinance debars is an order for recovery of land but it permits in lieu thereof an order declaring that the plaintiff in any such proceedings is entitled as against the Government to the land which is exactly the effect of any order of court

made under s 134(2) setting aside the order of the Collector declaring the land forfeit to the State Authority.

[50] The plaintiff elected not to appeal or cross appeal against the learned JC's refusal or failure to grant the declaratory order under s 29(1)(b) of the GPA, which must be taken as acceptance that it was not entitled as against the State Government to the land or to the possession thereof.

[51] Without such declaratory order, and without an order that the re-entry of the land be set aside or annulled, there was no basis in law for the plaintiff to claim for damages for the re-entry of the land by the second defendant on the premise that it had been deprived of the land. As such the award of damages by the learned JC was not sustainable in law.

[52] We agree with the defendants that the effect in law of having only the sole declaration granted by the High Court pursuant to prayer (a) of the re-amended statement of claim coupled with the failure by the plaintiff to secure the other declarations that it prayed for in the re-amended statement of claim are these:

(a) the court merely declared the act of the second defendant in re-entering the land was unlawful, invalid, and null and void, ie there was an invalid administrative act or decision of the second defendant who had a public duty to administer the provisions of the Land Code;

(b) the re-entry or forfeiture of the land was not set aside as clearly explained by the learned JC in para 99 of the grounds of judgment;

(c) therefore the land became state land in accordance with s 33A(4) of the Land Code and came under the control of the State Government by reason of s 12 of the Land Code. Both parties agree that no order for recovery of the land may be made by the court;

(d) without the order under s 29(1)(b) of the GPA, there is no legal foundation for any claim for damages for deprivation of the land. Had such order been granted, there would have been 'deprivation of property' to enable compensation to be claimed by the plaintiff by virtue of art 13 of the Constitution read with s 197 of the Land Code;

(e) the damages granted by the High Court was not for invasion of property rights as there was no declaration that the re-entry was an invasion of the plaintiff's property, and no damages was awarded for invasion of the plaintiff's right over the property;

(f) damages was awarded in terms of prayer (g)(ii) of the re-amended statement of claim, as an order that the fourth defendant do pay to the plaintiff as compensation the sum of RM11,340,640 being the value of

the land as at the date of re-entry on 13 February 2006 and the improvement of the land in the sum of RM600,000 with interest at the rate of 5%pa from 13 February 2006 till full payment;

(g) there was no basis for the plaintiff's submission that the damages awarded by the learned JC was for breach of the constitutional protection enshrined in art 13 of the Constitution because:

(i) the learned JC never declared that the re-entry or forfeiture was a 'deprivation of property rights' of the plaintiff (even though such a declaration was sought by the plaintiff);

(ii) the damages awarded was for the value of the land which the plaintiff complained it had lost; and

(iii) in this case the forfeiture of the land was not unlawful in that it was not set aside by the High Court and was a forfeiture which was authorized by law and is therefore not a deprivation of property: *Mohd Khir bin Toyo v Public Prosecutor* [2015] 5 MLJ 429; [2015] 8 CLJ 769.

[53] Section 33A(4) of the Land Code referred to by learned counsel in para (c) above stipulates as follows:

> (4) On the date of re-entry of the land, the Superintendent shall cause to be entered on the Register a memorial that the land had been re-entered by him on behalf of the Government, and upon the entry of such memorial, the interest and estate of the proprietor and any other interest registered against the land, shall be terminated, and the issue of document of title for the land shall be deemed to have been cancelled and no claims shall lie against the Government for the refund of any rents or other moneys paid in respect thereof.

[54] As to what the sole order of declaration was intended to be by the learned JC, His Lordship had explained as follows:

> I must point out that on the facts here, the court in granting a declaration that the re-entry is invalid, null and void, is declaring that the re-entry is null and void. In this case, *the court did not grant the order that the re-entry be set aside*, or that the memorial of the re-entry be expunged from the Register or that the certificate of re-entry be expunged from the Sarawak Government Gazette and be set aside as sought by the plaintiff. *A declaration that the re-entry is null and void does not amount to the court granting relief against forfeiture* because the effect of a grant of relief against forfeiture is to set aside or annul forfeiture of the Land. (Emphasis added.)

[55] It bears repeating that the plaintiff elected not to appeal or cross-appeal against the refusal by the learned JC to grant the rest of the orders or declarations it sought for in the re-amended statement of claim. In this regard, we were referred to the decision of this court in *Pengerusi Suruhanjaya*

Pilihanraya Malaysia v See Chee How & Anor [2015] MLJU 1831; [2015] 8 CLJ 367 where we said at para [81] of the judgment:

> [81] In the appeal before us, the High Court's refusal to grant prayers (a) and (b) of the application is a decision that is adverse to the respondents and appealable at their instance. The respondents should have filed a separate notice of appeal if they wanted the decision to be reversed or set aside ...

[56] As for the defendants' contention that the High Court's refusal to grant an order that the re-entry by the second defendant be set aside means that the orders granting compensation and exemplary damages had no legal foundation, the plaintiff's answer as we said was that it would be unjust for the court to make such an order since SEDC is now the registered proprietor of the land and who would enjoy indefeasibility of title. We have dealt with the point and we shall not repeat it.

[57] It needs to be emphasised that the sole declaration granted by the High Court was only in relation to the first part of prayer (a) of the re-amended statement of claim, which means the High Court, in the exercise of its discretionary power (declaration is a discretionary remedy) had determined that no declaration be granted to declare the re-entry of the land by the second defendant to be an invasion of the property rights of the plaintiff as the registered owner of the land, although that order was sought for in the second part of prayer (a) of the re-amended statement of claim.

[58] In reply to the plaintiff's contention that the reliefs sought in the re-amended statement of claim were not granted because they had been rendered academic at the time when the judgment was delivered due to the fact that the land had been auctioned off and sold to SEDC, the defendants' argument, which we are in agreement with, was that the contention was misconceived for the following reasons:

(a) even the High Court took into account the disposal of the land when awarding exemplary damages;

(b) the fact that the land had been sold by public auction was not the reason why the learned JC refuse to grant the other reliefs sought; and

(c) no submission was made by learned counsel for the plaintiff in the court below that the plaintiff did not want the other reliefs because they had become academic.

[59] As an overview, the question to ask in relation to the issue that we posed is whether the plaintiff was entitled to and had proprietary rights over the land, and if so whether it had been deprived of such rights when the second defendant re-entered the land on 13 February 2006. Having regard to the

surrounding facts and circumstances of the case, our answer to the question is that the plaintiff had no such proprietary rights over the land and therefore the question of being deprived of such rights does not arise at all.

[60] Even though the High Court had ruled that the re-entry of the land by the second defendant on 13 February 2006 was unlawful, invalid, and null and void, the question whether the re-entry gives rise to an award of damages does not depend on the unlawfulness or invalidity of the re-entry alone but whether the plaintiff was entitled as against the State Government to the land or to the possession thereof.

[61] The view that we take is that the plaintiff was not entitled to the land and had not been unlawfully deprived of the same as the land had been forfeited to the State Government and the forfeiture order had not been set aside or annulled by any court, and the plaintiff elected not to appeal against the failure by the learned JC to set aside the forfeiture order.

[62] Further and in any case, no allegation of misfeasance in public office nor negligence (both tortious acts) was pleaded nor proven against the second defendant to entitle the plaintiff to damages for the second defendant's act of re-entering the land on 13 February 2006. It must follow that the plaintiff was not entitled to the relief of monetary damages based on the sole declaration granted pursuant to the first part of prayer (a) of the re-amended statement of claim.

[63] We agree with the defendants that this is a case where the plaintiff (who had stopped works on the construction of Jade Hotel on the land for over ten years), having been granted relief against forfeiture, was unable, unwilling or refusing to fulfil the condition of providing a cash bond as security for the completion of the hotel should ownership of the land be restored to the plaintiff.

[64] The decision by the State Government to impose the said condition was never set aside or nullified or declared invalid by the High Court nor quashed through judicial review proceedings initiated by the plaintiff. The learned JC merely found the condition to be unreasonable, but fell short of setting it aside.

[65] The alleged loss of the land was, in the circumstances of the case, caused by the plaintiff itself in failing to comply with the condition set for the grant of relief against forfeiture and the High Court did not see it fit to set aside or annul the order of forfeiture nor the re-entry of the land by the second defendant.

[66] The forfeiture order therefore remains a valid order and for that reason, the plaintiff was not entitled as against the State Government to the land or to

A the possession thereof within the meaning of s 29(1)(b) of the GPA. Proviso (b) to s 29(1) of the GPA would only apply to assist the plaintiff if the High Court had made a declaratory order that the plaintiff was entitled as against the State Government to the land or to the possession thereof.

B **[67]** There was no such order in the present case, and as we explained earlier, the fact that the land is now registered in the name of SEDC (and therefore not in the State Government's possession) is of no consequence as the plaintiff was merely asking for a declaratory order that it was entitled as against the State Government to the land or to the possession thereof, in lieu of recovery or
C delivery of the land.

[68] For the foregoing reasons, our answer to the question posed is in the negative. In the circumstances, we allow the appeal with costs of RM200,000 to the defendants, the same sum that was awarded to the plaintiff by the High
D Court. The whole decision of the High Court on damages is set aside. The deposit is refunded to the respondent.

Appeal allowed and High Court's decision on damages set aside.

E Reported by Ashok Kumar

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